

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS MORNINGSTAR,

Defendant-Appellant.

UNPUBLISHED

September 11, 2003

No. 239554

Muskegon Circuit Court

LC No. 01-045963-FH

Before: Cooper, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of delivery of less than fifty grams of a controlled substance, MCL 333.7401(2)(a)(iv), and was sentenced as an habitual offender, second offense, MCL 769.10, to 245 days in jail. Defendant appeals as of right, arguing that he is entitled to reversal of his conviction because he was entrapped during the initial transaction involving cocaine, and that the second transaction, for which he was convicted, was tainted by the entrapment that occurred during the first transaction. We affirm.

A trial court's finding regarding entrapment is reviewed for clear error. *People v Johnson*, 466 Mich 491, 497; 647 NW2d 480 (2002); *People v Juillet*, 439 Mich 34, 61; 475 NW2d 786 (1991). Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made. *People v Kurylczuk*, 443 Mich 289, 303; 505 NW2d 528 (1993). A defendant has the burden of establishing by a preponderance of the evidence that he was entrapped. *Johnson, supra* at 498.

Entrapment occurs when (1) the police engage in impermissible conduct which would induce a normally law abiding person to commit the crime, or (2) the police engage in conduct so reprehensible that it cannot be tolerated by the court. *Johnson, supra* at 491. Where law enforcement officials present nothing more than an opportunity to commit the crime, entrapment does not occur. *People v Butler*, 444 Mich 965, 966; 512 NW2d 583 (1994).

Here, defendant contends confidential informant Wilson entrapped him during a drug transaction that occurred on March 28, 2001. However, criminal charges arising from the March 28, 2001, transaction were dismissed without prejudice by the prosecutor's office. On April 2, 2001, Detective Yax, acting in an undercover capacity, contacted defendant directly to arrange to purchase cocaine. The April 2, 2001, transaction forms the basis for the present conviction. Wilson was not involved in the April 2, 2001, transaction, and none of the factors that would

contribute to a finding of entrapment during the March 28, 2001, transaction were present on April 2, 2001. Each transaction, and the facts and circumstances surrounding it, must be evaluated individually to determine if the entrapment has resulted in a taint. *People v Larcinese*, 108 Mich App 511, 515; 310 NW2d 49, (1981). And

[I]nitial entrapment does not immunize a defendant from criminal liability for subsequent transactions he readily and willingly undertook. Accordingly, even if the Court of Appeals had been correct in concluding that defendant was entrapped during the first transaction, his willingness to participate in the second transaction, after his duties were more emphatically explained, would prohibit dismissal of the second charge. [*Johnson, supra* at 505; citations omitted.]

Because defendant concedes that he willingly sold cocaine on April 2, 2001, to Detective Yax, and because there is no evidence that defendant was induced to commit that crime by any impermissible police conduct, the trial court did not clearly err in finding that defendant was not entrapped.

Affirmed.

/s/ Jessica R. Cooper
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly